

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 164

MORRY LEVINE, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

CRIMINAL No. C 152-292

THE UNITED STATES, Appellee,

against

MORRY LEVINE, Defendant-Appellant.

Appendix to Appellant's Brief—Filed June 25, 1957



[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Crim. No. C 152-292

THE UNITED STATES

vs.

MORRY LEVINE

DOCKET ENTRIES

Violation—Contempt of Court. Refusal to answer questions before Grand Jury.

Date—4-23-57

Name—M. L. Levine

Amt. Rec'd—\$5—

Date—4-26-57

Name—pd U. S. Treas.

Disb.—\$5—

Date

Proceedings

4-22-57

Morry Levine having been directed by the Court to answer certain questions put to him by the Grand Jury, and having refused to answer said questions, the government moves to have Morry Levine adjudged guilty of contempt of Court. The Court adjudges the witness Morry Levine guilty of contempt of Court and imposes a sentence of One Year at a place of confinement to be designated by the Atty. Genl. Bail fixed at \$5000. pending appeal. Paroled until 4-23-57 at 3 PM to give bail.

RICHARD H. LEVET, J.

Date

Proceedings

4-23-57 Filed certificate and Order adjudging Morry Levine guilty of contempt of Court and sentencing him to imprisonment for a period of one year at a place of confinement to be designated by the Atty. Genl.
LEVET, J.

[fol. 2]

4-23-57 Issued certified copies of order to the U.S. Marshal.

4-23-57 Filed notice of appeal to the US CA.

4-23-57 Filed order extending the bail limits of Morry Levine. Consented to by U.S. Atty. and Surety.
LEVET, J.

5-2 -57 Filed a true copy of an order filed and entered on 4-23-57 Levet, J. Released on \$5,000 Bail by Comm. Bishopp on 4-23-57.

May 16, 1957 Filed Transcript of record of proceedings, dated 4/18; 22/57

[fol. 3]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORDER OF CONTEMPT—April 23, 1957

Morry Levine, having appeared before the United States Grand Jury for the Southern District of New York on April 18, 1957, and having refused to answer certain questions, and on April 18, 1957, a hearing having been had, and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, having been heard, and the defendant having been directed to answer said questions by the Honorable Richard H. Levet, United States District Judge for the

Southern District of New York; and the defendant having again appeared before the United States Grand Jury for the Southern District of New York on April 22, 1957, and having refused to answer said questions as directed by the Court, and having again appeared before the Honorable Richard H. Levet on April 22, 1957, and having refused to answer said questions when put to him by the Court; and Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, having been heard, and due deliberation having been had thereon, and upon all proceedings heretofore had herein; it is

ORDERED, that in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, the defendant, Morry Levine, [fol. 4] hereby is found to be in contempt of this Court for violation of Title 18, United States Code, Section 401 (3), and is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a period of one year.

Dated: New York, N. Y., April 23rd, 1957.

Richard H. Levet, U. S. D. J.

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CERTIFICATE OF JUDGE LEVET—April 23, 1957

In accordance with Rule 42(a) of the Federal Rules of Criminal Procedure, I hereby certify that the following acts were committed in the presence and the hearing of the Court and constitute a contempt of the Court:

On April 18, 1957, the defendant Morry Levine was brought before me and in the presence of the United States Grand Jury for the Southern District of New York, cer-

tain questions were read, and the defendant claiming that he was privileged to refuse to answer said questions on the ground of self-incrimination, and after a hearing was had in which it was established that the said Grand Jury was conducting an investigation under Chapter 8 of Title 49, United States Code, and that the said defendant had been called to testify as a witness in the said investigation, [fol. 5] and after hearing arguments by Wegman, Epstein & Burke, Esqs., Myron L. Shapiro, Esq., of counsel, for the defendant, and Paul W. Williams, United States Attorney for the Southern District of New York, by Herbert M. Wachtell, Assistant United States Attorney, of counsel, for the United States of America, and in view of the provisions of Title 49, United States Code, Sections 46 and 305(d), I directed the defendant to answer those questions.

On April 22, 1957, Morry Levine was again brought before me and in the presence of the United States Grand Jury for the Southern District of New York, I put to him the same questions which he refused to answer after having been directed to do so and failed to state any valid reason why he should not be held in contempt of this Court. The questions which were asked are as follows:

"Q. Are you associated with Young Tempo, Incorporated?

Q. Does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T & R Trucking Company?

Q. Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Levine, does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has [fol. 6] applied for or obtained a permit from the Interstate Commerce Commission to operate as a

contract trucker between New York, New York, and Midvale, New Jersey?"

Accordingly, in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure, I summarily found Morry Levine in contempt of this Court and committed him to the custody of the Attorney General or his authorized representative for imprisonment for a period of one year.

Dated: New York, N. Y., April 23rd, 1957.

Richard H. Levet, U. S. D. J.

[fol. 7]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Proceedings of April 18, 1957

Before Hon. Richard H. Levet, District Judge.

New York, April 18, 1957.

APPEARANCES:

Paul W. Williams, Esq., United States Attorney, for the Government; by Herbert M. Wachtell, Esq., and Charles H. Miller, Esq., Assistant United States Attorneys.

Myron L. Shapiro, Esq., Attorney for the Witness.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Off the record.

(Discussion off the record.)

Mr. Wachtell: The April regular 1957 Grand Jury requests the aid and assistance of the Court, in a direction to a witness, Morry Levine, who has this morning appeared before the Grand Jury and declined to answer certain questions that have been put to him.

The Clerk: What is the name of the witness?

Mr. Wachtell: Morry Levine.

If I may further state for the record, Mr. Levine is represented by Mr. Myron Shapiro, an attorney of this

city, that Mr. Shapiro has previously, two weeks ago, in this Court, represented Mr. Emanuel Brown, a witness who was similarly situated to Mr. Levine.

I will say that the Government in this matter will request the Court that the identical procedure be followed [fol. 8] as was followed in the case of Mr. Brown, and I wish to state that is the Government's understanding of these proceedings, as previously stated, and understood by Mr. Shapiro, on the hearing, at the time of the hearing as to Mr. Brown.

The Court: I am inclined to follow the same general procedure.

Mr. Shapiro: If your Honor please, am I to understand that this is the only hearing which we will have?

Mr. Wachtell: That is the Government's position.

The Court: As far as I can see, yes. If the witness testifies, there will be no further hearing. If he does not testify, he will be returned here and directed to answer these specific questions.

Mr. Wachtell: I will state that in this case of Mr. Levine the subpoena was originally served upon March 27, 1957; that an adjournment was then had as a result of a conversation between Mr. Shapiro and myself; that a letter was sent last Friday by the United States Attorney's office requesting the appearance of Mr. Levine today.

Particularly in view of the prior proceeding with Mr. Brown and the argument that was had before this Court, as well as an argument which was had before the Court of Appeals on a bail motion as to Mr. Brown, I believe that Mr. Shapiro is well advised of the nature of the proceeding that the Government would contemplate in this case should the witness decline to answer questions, and that therefore has had full and adequate opportunity to prepare any evidence or legal arguments that he would wish to advance at this hearing.

The Court: Yes.

Mr. Shapiro: If your Honor please, at this time, in view of the statement of the Assistant United States [fol. 9] Attorney that this is the only hearing that Mr. Levine will receive, I apply for an adjournment, for a notice under Rule 42 of the Federal Rules of Criminal

Procedure, for a specification of charges and for an opportunity to prepare for the trial.

The requirement of due process, I submit, compels the granting of such an adjournment.

Now in addition to that, I request the Court to grant this witness compulsory process from the Court to require the production and the attendance of witnesses and evidence so that we can meet the issues of fact on this hearing. The issues of fact, as I see it, among others, are: 1, whether this is genuinely an investigation under the Motor Carriers' Act, Chapter 8 of the Interstate Commerce Act. On that point, on that issue, I would have to subpoena, I believe, I request the Court to grant such a subpoena, Paul Williams, United States Attorney in this District all the minutes, all the Grand Jury minutes of this investigation so that we can determine from the Grand Jury minutes whether this is in reality an investigation under the Motor Carriers' Act.

I would like to subpoena the Interstate Commerce Commission and the Justice Department to determine whether this investigation has been directed for the purpose of investigating the violation or a purported violation under the Motor Carriers' Act.

I would request the production, through subpoena, of the charge by the Court, if any, to this Grand Jury and also the production of the interrogation of the Grand Jurors at the time of the impanelling of the Grand Jury, if there was any, by the United States Attorney.

I would respectfully call to the Court's attention the fact that Rule 6 of the Federal Rules of Criminal Procedure and the Constitution of the United States entitle [fol. 10] this witness to compulsory process from the Court and an opportunity and time to serve the same and to obtain the witnesses and the testimony on another issue in this case as to whether the purported immunity claimed to be extended to the witness under sections of the Interstate Commerce Act is co-extensive with his privilege against self-incrimination and for that purpose I respectfully request the Court to compel the production of the Grand Jury minutes of the other Grand Juries before which this witness has appeared on this other subpoena,

maybe ten or eleven times, so that it can be determined by the Court after examination of the minutes whether the immunity purported to be granted here is co-extensive with the privilege.

Another issue—

The Court: How is that to be determined?

Mr. Shapiro: I beg your pardon?

The Court: How would that determine it?

Mr. Shapiro: That would be determined in this way, your Honor: In the other Grand Jury proceedings this man was told by the Assistant United States Attorney, Mr. Wachtell, that he is going to be indicted, that he is a prospective defendant.

The Court: We went all over that question before. I still do not see what he said or did not say at the other Grand Jury investigations has anything to do with the extent of immunity before this Grand Jury. What he says here is immune, under the statute, which we referred to there.

Mr. Shapiro: I am entitled to make and establish our grounds and position here, your Honor.

The Court: You may.

Mr. Shapiro: We cannot determine this man's case by reference to what happened with respect to the witness [fol. 11] Brown. This man is here on a separate charge and is entitled to have the record made to his best advantage, especially where we are told that this is the only hearing that we are going to have. Another issue of fact which we have to present evidence on, or the Government has to present evidence and we have to be prepared to meet is the issue as to whether the questions are incriminatory.

I say to your Honor that the existence of these issues entitle and make clear that the witness is entitled for time, for adjournment, for notice to enable him to prepare for the hearing, and that he is entitled to compulsory process.

Now I would like to advert, if your Honor please, to the whole question of procedure. I respectfully submit to the Court that this procedure followed in this District and followed by your Honor or stated by your Honor that you

will follow in this matter is bad because it is violative of Rule 42(b) and violative of the due process clause of the Constitution. Under both provisions Mr. Levine is entitled to notice, a statement of essential facts constituting the alleged criminal attempt and a reasonable time for preparation.

I respectfully state that for those reasons that the matter should be adjourned so that the Government can prepare the proper notice, so that we can obtain the compulsory process necessary to meet the issues and so that we can prepare for the hearing.

The Court: The motion or application with respect to adjournment is denied. I do not believe that it is necessary under the circumstances and I therefore adhere to the proposed procedure. As far as the other matters are concerned, with respect to the production of witnesses and papers, I will listen to Mr. Wachtell.

[fol. 12] Mr. Wachtell: The Government, your Honor, will take no issue with the abstract principle that counsel in this hearing is entitled to call witnesses and may be entitled to utilize the subpoena power of the Court to have witnesses produced here. It should be noted that no subpoenas have been issued in this case on behalf of counsel, although this hearing has obviously been contemplated for some time. This is not an indigent defendant, and where the Rule requires the Court to issue the subpoenas at the Government expense.

Now, putting to one side the question of the availability of the subpoena power and the means by which the subpoena should be issued in this case, I submit to the Court that counsel for Mr. Levine has made it quite clear that the proof that he proposes to bring out by the witness and documents is completely irrelevant to the proceeding now before the Court. For that reason upon the very offer of proof, there is no reason whatsoever to put this proceeding over. The Government would urge that any of the evidence that he is attempting to introduce, that should the witnesses be here in court ready to take the stand, that that evidence should be excluded as irrelevant.

For example, the first theory under which Mr. Shapiro has stated that he would wish to introduce evidence was

that the inquiry presently being conducted by the Grand Jury is not a legitimate inquiry under the Motor Carriers' Act. For that purpose Mr. Shapiro has stated that he would wish to call the United States Attorney for the Southern District of New York, Paul W. Williams; that he would wish to procure all, and I emphasize the word "all", of all of the Grand Jury minutes in the investigation before this Grand Jury; that he would wish to subpoena persons and offer evidence of representatives of Interstate [fol. 13] Commerce Commission and the Department of Justice.

Now as to all those items of proof the law is quite clear that even after an indictment has been voted by a Grand Jury, it is not open to the defendant to look to the motive behind the Grand Jury investigation. The cases are legion in support of that proposition.

In this case it is quite clear and will be demonstrated by the Government from the very questions that were put to this witness, and which he has declined to answer, that the investigation is clearly and properly and indisputably within the statutory provisions of the Motor Carriers' part of the Interstate Commission Act.

There is no relevancy to his offer of proof and it could not very well show anything that would affect the proceeding in any way.

As to the request for the charge of the Court to this Grand Jury and the interrogation of the prospective Grand Jurors, I believe that that is a matter of which this Court may take judicial notice, and your Honor having personally charged the jury, this Court is personally aware, having been personally present.

This is the April, 1957 regular Grand Jury. I assume that the charge to the Grand Jury was in the normal form, and the Grand Jury, it is clearly established, has the power and authority to look into any alleged violation of the Federal criminal laws.

Counsel has further adverted to the question of whether the immunity to be granted to this witness upon his testimony is co-extensive with the privilege against self-incrimination, and for that he desires an inspection of

the Grand Jury minutes of all of the other Grand Juries before which this witness may have testified.

[fol. 14] Now all of these requests clearly are an attempt, first, to delay this proceeding, without basis, and, second, to turn the appearance of a mere witness before a Grand Jury into a fishing expedition, not only of all of the information which the Government might have in its possession, but as to all testimony had before this Grand Jury, and the testimony before all other Grand Juries of the testimony of this witness. Clearly a witness before a Grand Jury cannot by the mere refusing to answer a few questions thereby obtain access to confidential Grand Jury information and complete records of the Grand Jury investigation, and for these reasons it is the Government's position that the offer of proof made by counsel for the witness, Mr. Levine, has not raised any relevant line of inquiry.

If Mr. Levine wishes to present any witnesses he may make a further offer of proof, and the Government feels that he would be within his right on this hearing, but there has not been any relevant offer of proof made in the Government's opinion, and therefore there is no reason for an adjournment and no reason for the issuance of any subpoenas as requested by counsel.

Mr. Shapiro: I would like to respond to the points made by Mr. Wachtell.

The Court: You may.

Mr. Shapiro: We are not here arguing about the motive of the Grand Jury. If the immunity statute is applicable, the purposes of the investigation are a material issue in the case. We are trying to determine by the objective tests of what we are looking into with respect to other witnesses in this investigation.

I do not want all of the Grand Jury minutes. I do not think that Mr. Wachtell really believes that I wanted the minutes of every witness that was before this Grand [fol. 15] Jury in any matter. I want and ask the Court to examine the minutes of the Grand Jury pertaining to any other witnesses that may have been called pertaining to this particular investigation to determine whether that

investigation has the genuine purposes of an investigation under the Motor Carriers' Act.

Now Mr. Wachtell says that Mr. Levine has had since March 25th, that I have been up in the Court of Appeals with Mr. Brown and I have been here with Mr. Brown, why aren't your subpoenas out now? How could I get subpoenas before today? We have had no case here, no proceeding before today. Could I go to the District Court Clerk and say that I want to have subpoenas in a case which is not yet pending? There is no jurisdiction to issue them. How would I caption them? How could I describe them so the Clerk could put his seal on them and sign them? I had no opportunities to get subpoenas until now because there is no case until now when the Grand Jury comes down and says, "Your Honor, this is Mr. Levine. He won't answer certain questions, make him answer."

Now is the time when I have to get subpoenas, not three weeks ago. I had a casual conversation with Mr. Wachtell and Mr. Miller in their office. There is no case until now. That is the point on that. This is the time that I am entitled to subpoenas. What good is it for me, what good is the constitutional right to subpoena in compulsory process to Mr. Levine, if he cannot have them for this hearing, which is the only hearing that he is going to have, according to Mr. Wachtell? Why can't I have my subpoenas? You can rule on the evidence when I offer it, but you cannot prevent me, I suggest, your Honor, from getting them. The admissibility is not determined [fol. 16] now. It is determined when I offer it. That is the point. This man is entitled to make a defense at the only hearing that he is going to get.

The Court: I am going to dispose of it in this way. I do not believe that the proposed evidence is relevant or material or proper here. It is my humble opinion that no witness, assuming the questions to be within the scope of the proposed examination has the right to collaterally attack the purposes, motives, or the intent of this Grand Jury or the United States Attorney in the investigation of proper matters in the scope of the law enforcement under Federal jurisdiction.

As long as the questions propounded to this witness relate to those issues, it is my opinion that any effort to delve into the motives, purposes, or intent, as I stated, is entirely improper.

I do not believe that the minutes of the Grand Jury should be revealed. I see no reason for the waiver of the usual rule. There would be no value here on these issues of the testimony of the United States Attorney or any of the other proposed witnesses, or to the charge of the Court to this Grand Jury or to the interrogation of the jurors.

Unless, therefore, there were other proposed witnesses and unless there is other proposed evidence, I must deny the motion for any adjournment, and I so do.

Mr. Shapiro: The other witnesses that I adverted to are on the issue whether the questions are incriminatory and seek to produce evidence here—

The Court: I cannot tell that until I hear the questions. If I believe that during the questions that you are entitled to witnesses, you may be certain that I will allow you an opportunity to secure such witnesses.

[fol. 17] Mr. Shapiro: If your Honor please, I respectfully except to your Honor's ruling on all my motions and applications, and in order that I may be able properly to represent Mr. Levine on this hearing, I respectfully request that the Court direct the United States Attorney to have the United States Attorney's stenographer furnish me with a transcript of the Grand Jury proceedings which were had this morning, so that I may be able to prepare.

Mr. Wachtell: That is the Government's next step. I proposed to offer the proof and to have the entire Grand Jury proceedings read into the record. It is not particularly long.

The Court: I do not think it necessary to submit a copy to counsel. You may proceed.

Mr. Shapiro: I respectfully except.

IDA F. GOLD, called as a witness on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Will you state your full name, please?

A. Ida F. Gold.

Q. Are you a Grand Jury reporter duly sworn and authorized to take the testimony of Grand Juries in the Southern District of New York?

A. I am.

Q. Acting in that capacity, did you take a portion of the testimony of the witness, Morry Levine, before the April, 1957 Grand Jury this morning?

A. Yes, sir.

Q. Do you have your stenographic notes of that testimony with you?

A. I do.

[fol. 18] Q. And do they, to the best of your ability, reflect a true and accurate record of what was said?

A. Yes.

Q. Will you read them, please?

A. (Reading):

"By Mr. Wachtell:

"Q. Will you state your full name and address, sir, for the record.

"A. Morry Levine, 3388 Wayne Avenue, Bronx, New York; M-o-r-r-y L-e-v-i-n-e.

"Q. Mr. Levine, have you come here today with your attorney?

"A. I have.

"Q. What is your attorney's name?

"A. Myron Shapiro.

"Q. Is Mr. Shapiro in the anteroom, outside of this Grand Jury?

"A. He is.

"Q. I will advise you, sir, and I feel that the Foreman will concur, that should the occasion arise where you would

wish to consult with your attorney, and if a reasonable request is made, that this Grand Jury will undoubtedly grant your request. Do you understand that?

"A. I do.

"Q. Mr. Levine, have you received a Grand Jury subpoena calling for your appearance before this Grand Jury?

"A. I have.

"Q. Do you have the subpoena card of that Grand Jury subpoena with you.

"A. I do not. Wait a minute—no, I don't."

I was relieved by another stenographer.

Mr. Wachtell: No further questions, your Honor. Are there questions by the witnesses' counsel?

The Court: Do you want to question this witness?

Mr. Shapiro: No, your Honor.

(Witness excused.)

The Court: Next witness.

Mr. Wachtell: The Government calls Miss Emily Cordes.

[fol. 19] EMILY CORDES, called as a witness in behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Miss Cordes, are you a Grand Jury reporter duly sworn and authorized to take testimony of witnesses before the Grand Jury sitting in the Southern District of New York?

A. I am.

Q. Were you acting in that capacity this morning for the April, 1957 regular Grand Jury with the witness, Morry Levine?

A. Yes, I was.

Q. Do you have your stenotype notes of that testimony with you?

A. Yes.

Q. Do those notes, to the best of your ability, represent a true and accurate copy of the testimony?

A. Yes.

Q. Will you read that to the Court?

A. (Reading):

"Q. Now, I show you a Grand Jury subpoena original dated March 26, 1957, and ask you if you've ever seen this subpoena before.

"A. My recollection was that it was a card. Is that a reprint of this subpoena?

"Q. You say you received a card, is that correct?

"A. That is right.

"Q. Were you shown the original subpoena at that time, do you recall?

"A. I don't recall that.

"Mr. Wachtell: May the record reflect that the original Grand Jury subpoena that I have is addressed to Morry Levine, care of Young Tempo, Inc., 1375 Broadway, New York, New York, that it is dated March 26, 1957, that it is returnable April 3rd, 1957, at 10:00 A.M., and that it calls for Mr. Levine 'to testify and give evidence in regard to an alleged violation of Sections 309 and 322 of Title 49, U.S.C.' May the record further indicate that the [fol. 20] return of the United States marshal on this subpoena indicates that it was personally served upon Mr. Morry Levine on March 27, 1957, at 1375 Broadway. May the record further indicate that the adjournment of this subpoena from April 3rd, 1957, was agreed upon between Mr. Shapiro, counsel for Mr. Levine, and myself, and that Mr. Levine is presently before the Grand Jury in response to a letter of the United States Attorney, calling for his appearance today, April 18, 1957, at 10:30 A.M.

"Q. Is that correct, Mr. Levine?

"A. It's correct.

"Q. Mr. Levine, are you associated with Young Tempo, Inc.?

"A. May I consult with my attorney on that question, please?

"Mr. Wachtell: I would suggest it to the Foreman.

"Foreman: Yes, you may.

"(Witness leaves room, then returns.)

"Q. Mr. Levine, you understand, of course, that you're still under oath.

"A. I do.

"Q. Have you consulted with your attorney?

"A. I have.

"Mr. Wachtell: May we have the question read, please.

"(Question read back as follows: 'Mr. Levine, are you associated with Young Tempo, Inc.')

"The Witness: I must refuse to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, I will advise you at this time that this Grand Jury is conducting an investigation into possible [fol. 21] violations of the Interstate Commerce Laws of the United States, and, more specifically, the sections of the United States Code that were specified on the subpoena served upon you which I have previously read into the record here. I will further advise you, sir, that in Title 49, United States Code, Section 305(d), the Congress of the United States has provided that any witness who is compelled to give testimony as to any matter arising under the Motor Carrier Part of the Interstate Commerce laws—and that includes the sections under which this Grand Jury investigation is being conducted—that any such witness shall, by virtue of his testimony, be given full and complete immunity from any prosecution as to any criminal offense which might arise out of the subject matter of his testimony. That grant of immunity provided by Congress is as broad as the constitutional privilege and protection that you would otherwise have under the Fifth Amendment to the United States Constitution. Consequently, as by your testimony here you will receive such a full grant of immunity, I will advise you that you do not have any privilege to plead the Fifth Amendment before this Grand Jury in this inquiry. Now, this is a matter which, as I am sure you know, has previously been the subject of much discussion between your attorney, Mr. Shapiro, and the United States Attorney's Office. As you likewise know, I am sure, it has previously been before the United States District Court here last week in connec-

tion with the appearance of your partner, Mr. Emanuel Brown. Now, in view of the fact that you do not, by virtue of this immunity statute, have any privilege to claim before this Grand Jury, I will now ask that the Foreman direct you to answer that question.

[fol. 22] "Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I must respectfully decline, sir, on the grounds that it may tend to incriminate me, sir.

"Q. Have you understood the statement I made, that even if the answer to that question might tend to incriminate you, you are not entitled to plead the Fifth Amendment because of the fact that you would receive immunity by virtue of your testimony? Do you understand my statement?

"A. Mr. Wachtell, I do understand your statement.

"Q. Do you wish to consult with your attorney again, in view of the fact that the Grand Jury Foreman has directed you to answer that question?

"A. I would like to avail myself of that.

"Foreman: You are excused.

"Witness: Thank you.

"(Witness leaves the room, then returns.)

"Q. Now, Mr. Levine, you are, of course, still under oath. Have you consulted with your attorney?

"A. I have, Mr. Wachtell.

"Mr. Wachtell: Once again, may we have the question read, if you please.

"(Question read back: 'Mr. Levine, are you associated with Young Tempo, Inc.?)

"Witness: Mr. Wachtell, I have talked with my attorney, who's in the anteroom, upon your direction, and he told me that there are substantial questions of law involved in this matter that we've discussed. He has told me that in a similar case, that of Emanuel Brown, which is before

[fol. 23] the Court of Appeals and has granted Mr. Brown bail, that the question of whether there is immunity is not clear and not definite in his mind or in my mind.

"Q. Are you, therefore,—

"A. And, therefore, I must respectfully decline to answer the question on the grounds that it may tend to incriminate me.

"Q. This is despite the direction of the Grand Jury Foreman that you answer the question?

"A. I have respectfully declined for the reason I gave, that it may tend to incriminate me, sir.

"Q. Mr. Levine, does Young Tempo, Inc., use a trucking company known as the T. & R. Cutting Company or the T. & R. Trucking Company?

"A. I must refuse to answer that question on the grounds that it may tend to incriminate me, sir.

"Mr. Wachtell: Mr. Foreman, for the same reasons that I have previously set forth, I will ask that the witness be directed to answer the question.

"Foreman: As Foreman of this Grand Jury, I again direct you to answer the question put to you by the Attorney.

"Witness: I must respectfully decline, sir, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T. & R. Cutting or the T. & R. Trucking Company?

"A. Mr. Wachtell, I must decline to answer that question on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, again may the witness be directed to answer.

[fol. 24] "Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: Again I respectfully decline, sir, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. Mr. Wachtell, I refuse to answer that question on the ground that it may tend to incriminate me.

"Mr. Wachtell: May we have a direction, Mr. Foreman?

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: And I decline that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, does the T. & R. Trucking Company provide trucking services between Young Tempo, Inc., in New York City and the the Acme Dress Company in Midvale, New Jersey?

"A. I refuse to answer that question on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, may we have a direction, if you please.

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I refuse to answer that, sir, with due respect to you, on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you know if the T. & R. Trucking Company or the T. & R. Cutting Company has applied [fol. 25] for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I refuse to answer that on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman.

"Foreman: As Foreman of this Grand Jury, I direct you to answer the question put to you by the Attorney.

"Witness: I refuse to answer that, sir, on the grounds that it may tend to incriminate me.

"Mr. Wachtell: Mr. Foreman, may we have the witness excused temporarily, with direction to remain outside of the Grand Jury room for further directions.

"Foreman: Would you please be excused as Mr. Wachtell directs.

"Witness: Yes, sir.

"(Witness excused.)

"(Grand Jury adjourned to Court room 318.)"

Mr. Wachtell: I have no further questions of this witness, if your Honor please.

The Court: Any cross-examination?

Mr. Shapiro: No cross.

(Witness excused.)

Mr. Shapiro: May it be stipulated that the witness here appeared pursuant to subpoena?

Mr. Wachtell: Yes.

Mr. Shapiro: And that his appearance was compelled and not voluntary?

Mr. Wachtell: Yes. There was an agreement between counsel that the appearance would be adjourned until convenient. The Government then sent a letter to Mr. Shapiro with a copy to Mr. Levine requiring his appearance, and the Government will agree that the appearance was compelled pursuant to the subpoena.

The Court: Anything further from you?

Mr. Wachtell: The Government rests.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Anything further?

Mr. Shapiro: If your Honor please, I renew the motions and applications that I made before?

The Court: On the same grounds?

Mr. Shapiro: On the same grounds also I call your attention, your Honor, to the necessity at this point for me to have an opportunity to present evidence on the question of whether the questions, on the issue, whether the questions are incriminatory. I respectfully request an adjournment for that purpose.

Would your Honor like before to go into the question of whether the immunity applies at this point, or do you want to deal with the question of my motions and applications? I would also like—

The Court: What do you propose to prove?

Mr. Wachtell: The Government will concede on the basis of the witness' continuing representation to the Grand Jury, the Government will concede that the answers to these questions might tend to incriminate him.

The Court: Then it is unnecessary to produce proof of that.

Mr. Shapiro: Well, on the other issues in the case, if your Honor please—

The Court: Those are, I take it, purely issues of law as to whether the immunity is as broad as the testimony. [fol. 27] Mr. Shapiro: I am talking about the motions and applications which I made before with respect to the issues of the genuineness of this investigation.

The Court: I adhere—all right, finish your statement.

Mr. Shapiro: —the genuineness of this investigation and also whether the immunity is co-extensive with the privilege which this man has under the Constitution not to give incriminatory testimony.

I would also like to make my objection again to this whole procedure on the ground that it deprives Mr. Levine of his rights under the Constitution and under Rule 42(b) of the Federal Rules of Criminal Procedure.

The Court: As to that, I do not believe that it falls within that rule.

As to the procedure, I believe that has been in effect proved. As to the application with respect to the production of certain witnesses specified by you, I am sure that the testimony and documents, and so forth, as referred to by you,—I do not believe that those are proper or necessary or relate to the issues.

I therefore deny the application.

Mr. Shapiro: I ask the Court to direct the United States Attorney to produce the manual or instruction sheet of the Department of Justice pertaining to investigations under the Motor Carriers' Act if there is one.

Mr. Wachtell: Your Honor, I will be frank and state that I do not know if there is one. In any case, however, I will only reiterate that the United States Attorney is an arm of the Government and the legal adviser to the Grand Jury. It is authorized and empowered to investigate all violations of the Federal Criminal Law. There are cases

stating that, as to anything internal, the Department of Justice regulations that might as a matter of internal Gov- [fol. 28] ernment policy limit such power or make such power contingent upon prior approval of superior persons in the Department of Justice are on merely matters of internal policy that cannot inure to the benefit of the defendant.

I am not stating that there are any such limitations in the present case, and I am quite sure that these are not, but even should there be, that is not a matter which a witness before the Grand Jury can raise in the court.

The Court: I do not believe that that is pertinent to this inquiry or to the testimony of this witness. I refuse to ask the Government to seek and obtain such manual, if there is any such manual.

Mr. Shapiro: It is pertinent in this sense, your Honor: I am entitled to show the administrative construction of Section 305-d by the Interstate Commerce Commission and by the Department of Justice over the years since its enactment in respect to criminal investigations and with respect to the question of immunity. I am entitled to these papers, if they exist, if there is any such statement, in order that I may offer whatever evidence is available as to the administrative construction of this Section which is before your Honor today.

Mr. Wachtell: Counsel is in fact asking the Government to do the legal research for him.

Mr. Shapiro: If it is a document which is in the private files of the United States Attorney or the Department of Justice, and it is not possible for me to find it in the library. I assure the United States Attorney if it were available in any library I would find it. But I do not have any access to the Department files.

The Court: I will deny the application.

Mr. Shapiro: If your Honor please, I respectfully except.

[fol. 29] Would your Honor want to hear me on the substantive question involved, on the question of the applicability or the immunity section, if any?

The Court: Yes. Of course, you have gone into this rather thoroughly in the Emanuel Brown matter.

Mr. Shapiro: I have done it a little more thoroughly since then, your Honor.

The Court: I will be happy to listen.

Mr. Shapiro: My thinking on the question of the applicability of the statute is reenforced more and more because of the opportunity I had to look further into the situation.

Your Honor will recall that Section 305(d) of the Motor Carriers' Act is an Act which gives the Interstate Commerce Commission certain powers of investigation, subpoena, and so forth, and provides with respect to immunity of witnesses appearing in an investigation of any manner under this Chapter shall be entitled to the same immunity as a witness under Section 46.

First, when I advance the argument that this Section by its language did not incorporate the Section 46 to the extent that it would apply to Grand Jurors, I thought that this was a novel question, but research has disclosed, your Honor, that there are a number of statutes on the books enacted by Congress in which the Grand Jury was not given any power with respect to immunity, and the immunity provisions are restricted to Commissions or administrative officers.

For example, you have the Federal Trade Commission Act which was enacted in 1914, the Taft-Hartley Act. The Federal Trade Commission Act is 49 U.S.C.A., Chapter 2.

The Taft-Hartley Act is 29 U.S.C.A., Section 161, sub. 3.

The Court: What is the Federal Trade Commission?

Mr. Shapiro: 49 U.S.C.A., and the Taft-Hartley Act is 29 U.S.C.A., Section 161, sub. 3.

[fol. 30] The Merchant Marine Act of 1936, 46 U.S.C.A., Section 1124(e).

The Perishable Commodities Act, 7 U.S.C.A., Section 499(m), sub. F.

Section 15 U.S.C.A., Section 155, which is the China Trade Act—

The Court: 15 what?

Mr. Shapiro: U.S.C.A., Section 155, which is the China Trade Corporation Act.

42 U.S.C.A., Section 405, which is a Social Security Act.

42 U.S.C.A., Section 2201, which is the Atomic Energy Act.

50 appendix U.S.C.A., Section 1896, which is the Rent Control Act.

Then you have other statutes dealing with immunity such as the Securities Act of 1933, which does not limit the immunity to proceedings before the Commission but extends it to "any, cause or proceeding instituted by the Commission."

I gather from these sections, your Honor, that this is not something new; that Congress does not always give and extend the immunity statute, at least since 1914, to the Grand Jury proceedings; that in many cases it has restricted it to the Commission, so that that leads me at least to the conclusion that whatever section dealing with immunity must be carefully studied to determine whether it actually does extend the immunity to Grand Jury proceedings.

Now in this situation, re-reading Section 305(d), if we bear in mind that the punctuation marks are no part of the Act, and that to determine the intent of the law, this Court in construing the statute must disregard the punctuation, then we must take the whole of subdivision (d) of Sec-[fol. 31] tion 305 and read it together. And when we read it together, I respectfully submit, the conclusion is quite clear that the immunity attempted to be given there is restricted to investigations by and before the Commission and do not extend to Grand Jury proceedings.

Consequently, the offer of immunity by the United States Attorney in these minutes here today would prove an illusion and a snare to the witness, because at a later time he might be indicted on these matters because the Government might argue that he did not have immunity under the statute. The Government is not estopped. There is no estoppel against the Government here. We are in a position where we must rest upon his constitutional privilege to protect himself, otherwise he may endanger himself.

There are other points which I do want to urge upon you. If you will recall, Section 305(d) commences with the language: "So far as may be necessary for the purposes of this chapter."

Now I urge upon your Honor that that is a limitation upon the whole Section 305(d), and since it is such a limi-

tation, it limits the immunity and prevents it from being co-extensive with the Constitutional privilege to which Mr. Levine is entitled.

It is very easy to suppose, and quite probable, that it could be argued at a later time, that if the Government asked questions beyond the scope of the questions today, that the Government could then argue that they can use the incriminatory evidence and that they could indict Mr. Levine and prosecute him for the reason that only these questions which were asked of him are necessary for the purposes of this Chapter, and consequently the rest of it was not within the immunity statute.

The Court: Do you contend that any of these questions do not relate to the purposes of this Chapter?

[fol. 32] Mr. Shapiro: Some of them may not, your Honor.

The Court: I am not asking you—

Mr. Shapiro: I do not have a transcript in front of me. I cannot remember these six questions.

Mr. Wachtell: If I may interrupt, your Honor, the six questions here are identical, word for word, to the six questions that were put to Mr. Brown and form the basis of the former proceeding, so that I believe counsel does have those six questions before him.

Mr. Shapiro: That part is not relevant to this argument, your Honor.

The Court: If you don't press it, it isn't.

Mr. Shapiro: I am pressing the argument. I tell you why: The test of the immunity statute is not these questions, but whether it is co-extensive with the entire privilege as to any question.

The Court: At the threshold it is tested by those questions. If those questions do not exceed the purposes of the Chapter, and the Chapter has given the protection, then he is protected. I am not going to get into speculative questions which go beyond those which have already been asked. The only thing before this Court at this time are these six questions.

Mr. Shapiro: I respectfully disagree with your Honor.

I raise also at this time again the question of the other Grand Jury proceedings in which this witness was a

participant and in which he was told by the United States Attorney, Mr. Wachtell, that he will be indicted, that he is a defendant.

And I say therefore to your Honor that the immunity here necessarily cannot be co-extensive with the privilege which this man has because of that reason. And I therefore state to your Honor that the witness Levine has [fol. 33] properly claimed his privilege. It is conceded that the questions are incriminatory. And I contend, your Honor, I believe, correctly, that the immunity does not extend and does not cover the Grand Jury proceedings, therefore he should not be required to answer these questions.

Mr. Wachtell: If I may respond briefly, your Honor, the Government's position on this has been made quite clear in prior arguments in this Court in the matter of Emanuel Brown, as well as in the papers and arguments before the Court of Appeals.

Section 305(d), Title 49, unambiguously states that the witness shall have the same immunity as if the matter rose under Chapter 1 of Title 49. Chapter 1, namely, Section 46, Title 49, gives a complete and full constitutional grant of immunity, and quite explicitly as has been construed by the Courts, includes a Grand Jury proceeding.

The language of Section 305(d) is likewise quite broad and speaks of "any proceeding." It is not limited to "any proceeding before the Commission."

The statutes which Mr. Shapiro has cited as being limited to various forms of Commissions, quite specifically by their terms are so limited. For example, Mr. Shapiro has referred to the Federal Trade Commission Act. The language used there is "No person shall be excused from attending, testifying or producing documentary evidence before the Commission or in obedience to the subpoena of the Commission."

The Taft-Hartley Act, cited by Mr. Shapiro, says "No person shall be excused from attending and testifying or from producing books, records, correspondence, documents or other evidence in obedience to the subpoena of the Board."

[fol. 34] The Merchant Marine Act, which has been cited, says "No person shall be excused from attending and testifying or from producing books, papers or other documents before the Commission, or any members or officer or employee thereof," and then goes on.

It is quite clear that that is not the language of this statute and that this statute speaks of "any proceeding" under the Act. Counsel, in effect, is arguing that should a witness have relied on the clear and unambiguous language of the Motor Carriers' Act and have come before a Grand Jury, believing that he is going to get immunity, and have testified fully, that some day someone could turn around and say to him, "No, by some vague theory, the immunity that he thought he was getting he was not getting; although Section 305(d) says "Any proceeding" actually it does not mean what it says and does not enable him to get immunity before the Grand Jury, although he thought he was getting immunity.

That is the argument that was rejected by the Court of Appeals in the Monia case where under a similar question whether the privilege had to be claimed, the Supreme Court, quite clearly said that you have to abide by the Congressional language. If there is different language in the immunity statutes, you reach a different result.

Mr. Shapiro's further argument as to Congressional intent since 1914 not to provide immunity in Grand Jury proceedings is quite erroneous, and we can refer to the language of the Interstate Commerce Act to prove it; because under the Freight Forwarders' part and also the Water Carriers' part which fully incorporate Section 46, and both of which were enacted in much more recent times, approximately 1940, there can be no dispute but that Grand Juries were included in the immunity provisions.

[fol. 35] Congress has by its language in the Interstate Commerce Act quite clearly expressed the desire that all four parts of the Act included in the Motor Carriers' Act should be construed in *pari materia*, there is no reason to distinguish the motor carriers part from the others, and there is no reason for not thinking that under the clear language of the Act that the immunity provides for a Grand Jury proceeding.

The Court: Very well. Now under the circumstances and upon all the facts and upon all the record, and for the reason which I set forth at the time of the disposition of a similar matter, in the matter of the witness Emanuel Brown, I am forced to conclude that the immunity is there, that the witness must answer, and I therefore direct him to answer the questions which were set forth by the witnesses from the Grand Jury who testified today.

Mr. Shapiro: May I have a clarification, your Honor?

The Court: I direct the witness to answer the questions.

Mr. Shapiro: I understand that. Are you directing him to answer these specific questions?

The Court: These questions and any other pertinent questions, but I am directing him specifically to answer these questions.

Mr. Shapiro: I respectfully except to your Honor's ruling.

The Court: Very well. The Grand Jury, I assume, will retire then.

Mr. Wachtell: Yes, your Honor. I do not know the Court's convenience. I was going to suggest that some time could be saved if the Grand Jury would reconvene in the same court room and if it were clear of all persons except the Grand Jury personnel.

[fol. 36] The Court: All right.

Mr. Shapiro: If your Honor please, may I have an adjournment in order to consult with my client? May we approach the bench, your Honor?

The Court: Yes.

(Discussion at the bench between Court and counsel, off the record.)

The Court: The Grand Jury will recess until Monday at 10:30.

The witness will be available at the same place at 11:30.

Mr. Wachtell: Thank you, your Honor.

The Court: On Monday morning.

(Whereupon, an adjournment was taken to Monday, April 22, 1957, at 10:30 a.m.)

IN THE UNITED STATES DISTRICT COURT

Proceedings of April 22, 1957

APPEARANCES:

Paul W. Williams, Esq., and Herbert M. Wachtell, Esq.,
for the Government; Myron L. Shapiro, Esq., for the
Witness.

TRIAL CONTINUED

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Will those who have no other business in
the courtroom please leave now? I have a Grand Jury
proceeding.

[fol. 37] The Clerk: The Marshal will clear the court
room.

(Court room cleared by the Marshals.)

The Court: Off the record.

(Discussion off the record.)

Mr. Wachtell: If your Honor please, the April, 1957
regular Grand Jury once again requests the assistance of
the Court in regard to the witness Morry Levine, who has
again appeared before that Grand Jury this morning in
pursuance to the direction of the Court issued last Thurs-
day, April 18th. If your Honor please, the Government
at this time would wish to call Mrs. Margaret Connolly,
the Grand Jury Reporter, to inform the Court as to what
transpired in the Grand Jury room this morning.

The Court: Yes.

Mr. Shapiro: If your Honor please, I would request
that the procedure that we have now follow the require-
ments of Rule 42(d) of the Federal Rules of Criminal Pro-
cedure and the requirements of due process.

I believe that I should call to your Honor's attention
the case of Carlson vs. United States, which has pre-
viously been cited by the Government in these proceedings
and point out that the Court of Appeals in the First Cir-
cuit, in discussing this very question, said that when this
situation arises it must be prosecuted in accordance with

Rule 42(b) and the witness is entitled to notice of the facts constituting the criminal contempt, and he is entitled to frame his defense and put in his evidence directed to that issue.

Now the Government in citing the Carlson case only, of course, reads one part of it, but the balance of the opinion is very clear on this fact, which says:

"If the witness, instead of disobeying the Court's order in the actual presence of the Judge, proceeds back [fol. 38] to the Grand Jury room and there again refuses to answer the question which the Court directed him to answer, this is still disobedience of a lawful order of the Court within the meaning of 18 U.S.C. Section 401(3). But because such disobedience did not take place in the actual presence of the Court, and thus could be made known to the Court only by the taking of evidence, the Court would have to conduct the proceeding in criminal contempt in accordance with Rule 42(b).

"It is important that the Grand Jury witness accurately be put on notice of the nature of the proceeding. If it is nothing more than a request by the Grand Jury for a ruling by the Court on the availability of the privilege, then the witness should be informed that he is not being cited to answer a charge of a completed contempt of Court, and he will know that the only issue to which he shall have to address himself, at the hearing before the Court, is whether he was entitled to decline to answer the particular questions on the ground of his privilege against self-incrimination. The worst that could happen, if the ruling is against him, is that he would be given a second chance to go before the Grand Jury and answer the questions. If, on the other hand, he is being charged with misconduct in the jury room constituting misbehavior in the presence of the Court, this charge must be prosecuted on notice, and under Rule 42(b) the notice 'shall state the essential facts constituting the criminal contempt charged and describe it as such.' If the alleged misbehavior is a sneering, insolent, disrespectful attitude manifested by the witness in the jury room, then the requisite notice must set forth the essential facts constituting such misbehavior so that the

witness may frame his defense, and put in his defense directed to that issue. If the charge of misbehavior is that [fol. 39] the witness deliberately obstructed the Grand Jury proceedings by flatly refusing to answer questions, without any pretended excuse, the notice should specifically so state. If the charge of criminal contempt is that the witness declined to answer the questions upon the pretended ground that the answers would tend to incriminate him, this claim of privilege being advanced to bad faith, then (assuming that such conduct might be deemed misbehavior in the presence of the Court within the meaning of 18 U.S.C. Section 401(1) the required notice under Rule 42(b) would have to describe the alleged misbehavior in order that the witness, in preparing his defense to the charge, may direct his evidence to the issue of his good faith in claiming the privilege."

I think that the procedure outlined in the Carlson case is that which is required by due process and that which is required by Rule 42. I therefore respectfully request the Court to direct the United States Attorney to comply with Rule 42(b) and afford us notice of the charges, and opportunity to prepare and an opportunity to frame our defense to the charges.

Mr. Wachtell: If your Honor please, as counsel is aware, both from the prior proceeding and in this matter, as well as the proceedings that were had in the matter of the witness Emanuel Brown, whom counsel likewise represented, although there is no doubt in the Government's mind that this witness, Mr. Levine, has already been guilty of a consummated contempt in his refusal this morning—as will be brought out—to answer the questions that he had been previously directed to answer, the Government is not at this time requesting the Court to punish him for that contempt. The Government is instead giving the witness still another chance and is giving him even more protection than that outlined in the Carlson case, in that the Government is again bringing the witness before this Court, not to be punished for contempt, but again that he be directed to answer questions and then, and only then, if he refuses here and now in the physical presence of this

Court, he refuses to answer the questions that the Court shall direct him to answer, that he then be punished for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, and that procedure is specifically delineated and approved in the very Carlson case from which Mr. Shapiro has been reading from.

I will not take the time of the Court to read excerpts which establish that, at page 216 of 209 F. 2d.

The Court: Proceed.

Mr. Shapiro: If your Honor please, is your Honor overruling my application?

The Court: I am.

Mr. Shapiro: At this time I would also request an adjournment so that I may subpoena witnesses and request the issuance of compulsory process, and renew all the motions and applications which I made on Thursday.

The Court: For the same purposes as made on Thursday?

Mr. Shapiro: That is right, your Honor.

The Court: And No. 1 was to attempt to show that the proposed examination was not in accord or not within the confines of the Motor Carriers section? Was that the first one?

Mr. Shapiro: The first application was on the issue of fact in this proceeding, which I understand involves a claimed investigation under the Motor Carriers Act and is to show that this is not really an investigation under the Motor Carriers Act.

[fol. 41] The Court: And at least in answer to a question that I addressed to you, you pointed out no part of any one of the questions at issue which in your judgment was outside the Motor Carriers Act, in effect.

Mr. Shapiro: That is true.

The Court: You will concede that all of the questions are confined within the issues of the Motor Carriers Act.

Mr. Shapiro: I assume that the questions asked Mr. Levine this morning were the same as were asked on Thursday.

The Court: Well, I assume that.

Mr. Wachtell: That is correct.

The Court: Do you contend that any one of them is beyond the confines of the Motor Carriers Act?

Mr. Shapiro: In part, yes, your Honor.

The Court: Which one and which part?

Mr. Shapiro: "Are you associated with Young Tempo, Inc.?" In large part that is not connected with the Motor Carriers Act investigation.

The Court: It certainly lays the groundwork for the subsequent questions.

Mr. Shapiro: It also lays the groundwork for the real purposes of this investigation, your Honor, which is not under the Motor Carriers Act.

The Court: Is that all?

Mr. Shapiro: "Who do you know to be the owner or owners or the principals"—this may be a typographical error, but this is the way it reads in the paper that I have here, "Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?"

Then this question:

"Q. Are you associated with the Acme Dress Company in Midvale, New Jersey?"

[fol. 42] Mr. Wachtell, Your Honor, on the morning of the sentence, said, "None the less, as counsel for Mr. Brown has indicated frequently here, the subject matter to some extent and the witness Mr. Brown himself have been before other Grand Juries investigating, as I believe I stated to your Honor, on Friday, the Victor Riesel obstruction of justice case as well as the general racket investigation being conducted for the past year in this district.

"It is the Government's information, as the questions attempted to bring out in this case, that the witness, Mr. Brown, has been associated in certain respects with certain persons who are the subject of these investigations. The present one included information as to an interstate commerce investigation, these persons being John Dioguardi and Theodore Ray, as well as possibly others.

"The information that it is desired to elicit from this witness, I represent to the Court, is of the very greatest

importance, and the witness' refusal to answer is a very great stumbling block to this investigation and to all these investigations."

I believe that this is sufficient basis, your Honor, to enable us or allow us to proceed with proof to establish that the subject matter of this investigation is not primarily under the Interstate Commerce Act and possible violations of provisions of that Act, and that therefore we would like to be served with notice of the charges and an opportunity to prepare our defense against the alleged wrongdoing by Mr. Levine.

The Court: As I ruled Thursday, I must rule now, in so far as the proposed examination is concerned into the motives, intent, plans, and so forth, of the United States Attorney I do not believe that this scope or this field of investigation is proper. I do not believe that the intent [fol. 43] or motive of the United States Attorney here is subject to examination; I must assume that his office intends to comply with the law and to enforce the law. And I know of no reason nor authority for investigating the motives and going into any such investigation as that.

I therefore decline in so far as the questions are concerned which are here today and which were concerned before on Thursday, and I rule that they are pertinent to the investigation and are within the scope of the Motor Carriers Act, that the immunity is as broad as the questions, and I therefore overrule your objection. You may proceed.

Mr. Shapiro: If your Honor please, I except to your Honor's ruling.

The Court: Yes.

Mr. Shapiro: And I call your Honor's attention to a statement that you made, and I ask you to reconsider it.

The Court: Which is that?

Mr. Shapiro: You said that the immunity is as broad as the questions asked. And I respectfully state to your Honor that the test of the immunity is not whether it is co-extensive, with the question asked is whether it is co-extensive with the privilege of self-incrimination which this witness, Morry Levine, has. If your Honor please, that would bring me to the second issue of fact, and that

is an opportunity to present or to obtain evidence to demonstrate to this Court or to make an attempt anyway to demonstrate to this Court that the immunity purported to be granted here is not co-extensive with Mr. Levine's privilege against self-incrimination.

The Court: I believe it is.

Mr. Shapiro: I respectfully except.

Mr. Wachtell: The Government would call Miss Margaret Connolly, if your Honor please.

[fol. 44] MARGARET D. CONNOLLY, called as a witness on behalf of the Government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Wachtell:

Q. Mrs. Connolly, are you a Grand Jury Reporter duly sworn and authorized to record proceedings had before the Grand Jury in the Southern District of New York?

A. Yes.

Q. Acting in that capacity, did you make stenographic notes of the testimony of the witness Morry Levine before the April, 1957 regular Grand Jury this morning?

A. Yes.

Q. Do you have those notes with you?

A. Yes.

Q. And do they represent to the best of your ability an accurate transcript of what transpired before the Grand Jury?

A. They do.

Q. Will you read them for the benefit of the Court?

A. (Reading):

"MORRY LEVINE, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

"By Mr. Wachtell:

"Q. Will you state your full name, please?

"A. Morry Levine, M-o-r-r-y.

"Q. Mr. Levine, is your attorney Myron Shapiro with you today in the anteroom outside of this Grand Jury?

"A. Yes, sir.

"Q. Have you had the opportunity to consult with your attorney, Mr. Shapiro, since leaving the court room last Thursday, April 18th?

"A. For a short while; he had to go away.

"Q. You have consulted with him?

"A. For a while, yes, sir.

[fol. 45] "Q. I am going to put to you the six questions that you have previously declined to answer before this Grand Jury and that you have been directed to answer by Judge Levet of this Court. Mr. Levine, are you associated with Young Tempo, Incorporated?

"A. Mr. Wachtell, I'm declining to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you understand that you have been directed by a Judge of this Court to answer that question notwithstanding the fact that an answer may tend to incriminate you?

"A. I understand that, sir.

"Q. Mr. Levine, does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?

"A. I decline to answer that on the grounds that it may tend to incriminate.

"Q. Mr. Levine, who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?

"A. I must decline to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?

"A. Again I must decline to answer that question on the grounds that it may incriminate me.

"Q. Mr. Levine, does the T and R Trucking Company provide trucking service between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?

"A. Again, sir, I must decline to answer that question on the grounds that it may tend to incriminate me.

"Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has applied [fol. 46] for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?

"A. I must refuse to answer that, sir, on the grounds that it may tend to incriminate me.

"Q. Now, again, Mr. Levine, as to each of those six questions, do you understand that you have been directed by Judge of this Court to answer each and every one of those six questions?

"A. I understand that.

"Q. And despite that direction you are persisting in your refusal to answer those questions, is that correct?

"A. That's correct.

"Tr. Wachtell: Mr. Foreman, may we have the witness excused temporarily with a direction to remain outside of this Grand Jury room for further direction.

"Foreman: Will you wait outside, please.

"Witness excused.)"

The Court: Any cross-examination?

Mr. Shapiro: No, sir, your Honor.

The Court: You are excused.

(Witness excused.)

Mr. Wachtell: At this time, if your Honor pleases, and in accordance with the procedure which has been approved by the Court of Appeals of this Circuit, I would respectfully request that the Court place to the witness here and now the six questions he has previously refused to answer, and if the Court is so minded, to direct the witness to answer each of those questions.

The Court: Yes, will you take the stand.

Mr. Shapiro: I object to this, your Honor.

The Court: Overruled.

[fol. 47] MORRY LEVINE, called as a witness, was examined and testified as follows:

By the Court:

Q. You are still under oath, Mr. Levine, with respect to what is said here, and with respect to any testimony here, do you understand that?

A. Yes.

Mr. Shapiro: If your Honor please, what is this proceeding now? Is this the Grand Jury proceeding, or is this a contempt proceeding?

The Court: The Court and the Grand Jury.

Mr. Shapiro: I respectfully except. I object to any such procedure and I ask that we proceed in accordance with Rule 42(b), not in accordance with Mr. Wachtell's understanding of the practice in this District.

The Court: We are proceeding in accordance with Rule 42(a).

Mr. Shapiro: I respectfully except, your Honor. I also object to the witness being put on the stand in a proceeding in which he is in jeopardy and which involves the possibility of a criminal contempt, and I ask that he not be required to testify in a proceeding in which he is in jeopardy, in violation of his constitutional rights, irrespective of the question of immunity.

Certainly if we are proceeding in accordance with due process and in accordance with 42(b), he could not be compelled to take the stand. I do not know and I have never heard of a proceeding, your Honor, with all due respect in which the Grand Jury meets with the District Court Judge presiding.

[fol. 48] I do not know of any such proceeding. I do not know where it is provided for.

I respectfully again except to this practice and procedure.

The Court: Overruled.

By the Court:

Q. Mr. Levine, I am going to ask you certain questions and I direct you to answer the questions:

"Q. Are you associated with Young Tempo, Incorporated?"

Mr. Shapiro: I object, your Honor.

The Court: Overruled.

Mr. Shapiro: To the direction and the question.

A. Your Honor, I must respectfully decline to answer that question on the ground that it may tend to incriminate me.

Q. You decline to answer?

A. I do, sir.

Q. I ask you a second question:

"Q. Does Young Tempo, Incorporated, use a trucking company known as the T and R Cutting Company or as the T and R Trucking Company?"

I direct you to answer.

Mr. Shapiro: I object to the question and to the direction.

The Court: Overruled.

A. Your Honor, again I respectfully decline to answer the question on the ground that it may tend to incriminate me.

Q. You refuse and decline to answer?

A. Yes, sir.

Q. Third, I ask you another question:

[fol. 49] "Q. Who do you know to be the owner or owners or the principal in interest or principals in interest of the T and R Cutting or the T and R Trucking Company?" I direct you to answer.

Mr. Shapiro: I object to the question and the direction, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I must decline to answer that question on the ground that it might tend to incriminate me.

Q. "Q. Mr. Levine, are you associated with the Acme Dress Company in Midvale, New Jersey?" And I direct you to answer.

Mr. Shapiro: I object to the question and to the direction, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I respectfully decline to answer that on the ground that it might tend to incriminate me.

Q. You decline to answer?

A. I do.

Q. No. 5:

"Q. Does the T and R Trucking Company provide trucking services between Young Tempo, Incorporated, in New York City and the Acme Dress Company in Midvale, New Jersey?" And I direct you to answer the question.

Mr. Shapiro: I object to the question and the direction, your Honor.

The Court: Overruled.

Mr. Shapiro: Exception.

[fol. 50] A. Again I say I must decline to answer that question on the ground it might tend to incriminate me.

Q. You decline to answer?

A. I do.

Q. And sixth:

"Q. Mr. Levine, do you know if the T and R Trucking Company or the T and R Cutting Company has applied for or obtained a permit from the Interstate Commerce Commission to operate as a contract trucker between New York, New York, and Midvale, New Jersey?" And I direct you to answer.

Mr. Shapiro: I object to the question and to the direction.

The Court: Overruled.

Mr. Shapiro: Exception.

A. I must decline to answer the question upon the ground that it might tend to incriminate me.

Q. And you refuse to answer?

A. I do.

The Court: Very well.

Mr. Wachtell: The Government would further request, your Honor, if the Court would wish to put to the witness the general inquiry as to whether he would answer these questions or any of them, should he be directed to return to the Grand Jury and do so.

Mr. Shapiro: I object to that, your Honor.

The Court: Overruled.

Q. You have been directed to answer these questions. If you return to the Grand Jury room with the Grand Jury and you are asked those questions, would you still decline to answer?

Mr. Shapiro: I object to the question, your Honor.
[fol. 51] The Court: Overruled.

Mr. Shapiro: Exception.

A. I must decline to answer these questions, sir, on the ground that they may tend to incriminate me before the Grand Jury.

Q. And you would continue to so decline?

Mr. Shapiro: I object to that.

The Court: Overruled.

Mr. Shapiro: Exception.

Q. Is that so?

A. I would, sir.

The Court: Very well.

Mr. Wachtell: At this time, if your Honor please, the Government would request that the Court adjudge Mr. Levine in contempt of this Court for a violation of the lawful order and direction of the Court under Title 18, United States Code, Section 401, Subdivision 3 and in pursuance of Rule 42(a) of the Federal Rules of Criminal Procedure for a contempt committed in the physical presence of the Judge.

The Court: You may step down.

(Witness excused.)

COLLOQUY BETWEEN COURT AND COUNSEL

I will listen to any reason why I should not so adjudicate this witness in contempt.

Mr. Shapiro: If your Honor please, there are several reasons why this witness should not be adjudicated in contempt.

First of all, without repeating each and every objection and statement—

The Court: You do not need to repeat.

Mr. Shapiro: Yes, but the procedure as I respectfully stated is bad and not in accordance with the requirements [fol. 52] of due process and not in accordance with the requirements of Rule 42(b) of the Rules of Criminal Procedure and is violative of this man's constitutional rights, and therefore the procedure is bad and there is no basis for such a judgment to stand.

The immunity which your Honor has found to extend to this witness, I respectfully submit, does not extend, that Section 305(d) of the Motor Carriers Act does not apply to proceedings before a Grand Jury, and for all the other reasons stated by me during the course of this proceeding, and I respectfully ask your Honor not to adjudicate Mr. Levine in contempt of Court.

The Court: Mr. Levine, I am forced by reason of your conduct and your failure to answer to adjudicate you in contempt and I am prepared now to sentence.

Mr. Wachtell: On the question of sentence, your Honor, the identical factors which the Government brought to the attention of the Court in the matter of the witness Emanuel Brown, a portion of which has been read here this morning by Mr. Shapiro, may be applied to the present case of Mr. Levine. Again he is obstructing a very serious Grand Jury investigation and is doing so, although the Government is willing by virtue of the statute and authority to give him full and complete immunity from any prosecution against himself as to any matter as to which he might testify.

Now the Government for these reasons feels that a substantial sentence, and I would use the term again, is called for and it is not for its punitive effect but for a coercive effect upon this witness.

The Government again will ask that in pronouncing sentence this Court should not include what is commonly referred to as a purge clause. Again for the reason that [fol. 53] the Government stated in the matter of Mr. Brown the same end can be reached by this Court should the witness decide to testify under Rule 35 of the Federal Rules of Criminal Procedure, and a purge clause would only serve to give him the possibility of defeating the Grand Jury investigation at any time.

That is all the Government has to say on that point, your Honor.

The Court: Very well.

Mr. Shapiro: If your Honor please, may I be heard on sentence?

The Court: Yes.

Mr. Shapiro: I would like to point out to your Honor, although I am sure that your Honor is aware of it, that the section, I believe it is Section 322, of the Motor Carriers Act under which this purported investigation—under which this investigation purports to proceed, is a section which has a penalty which imposes no jail sentence and imposes only a monetary fine, except in cases of employees of the Commission who may violate certain restrictions of confidential communications, but so far as individuals who are subject to this Act, any offense under that Act is punishable only by a fine, a monetary consideration.

If your Honor please, the Government obviously, therefore, is here asking your Honor to punish this man or to coerce him, not for the purpose of a crime under the Motor Carriers Act, but for some other purpose, for some other reason, which in my opinion shows to this Court that the real purpose of this investigation is not an offense under the Motor Carriers Act, and that whereas, if this man were prosecuted or even if he gave testimony under this so-called immunity which incriminated anybody else, the Court could not sentence such an individual as this [fol. 54] witness to any jail sentence. All that would be involved would be a fine.

I therefore suggest to your Honor that the punishment of this alleged contempt should be coterminous with or equivalent to the nature of the offense that is involved

in the investigation and not the other purposes and other subject matter sought by the Government.

The Court: Mr. Shapiro, the two have nothing to do with each other, in my humble opinion. This is not a violation primarily of the Motor Carriers Act, but it is more than that. It is an obstruction of justice to the United States Government.

I do not follow you to the extent that this would inferentially permit a defendant to refuse to testify, to pay a fine and be absolved. I cannot follow this philosophy. I must therefore sentence the witness.

Mr. Wachtell: May I inquire whether your Honor, when you use the expression "obstruction of justice," are you referring to this witness' conduct here at this time?

The Court: Yes.

Mr. Wachtell: Thank you.

The Court: I therefore sentence this witness to one year.

I will entertain a motion for bail pending appeal. * * *

[fol. 55]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 2—October Term, 1958.

Docket No. 24669

UNITED STATES OF AMERICA, Appellee,

—v.—

MORRY LEVINE, Defendant-Appellant.

OPINION—June 2, 1959

BEFORE:

Clark, Chief Judge, Waterman, Circuit Judge, and Galston, District Judge.

Appeal from the United States District Court for the Southern District of New York, Richard H. Levet, Judge.

Morry Levine appeals from a conviction of criminal contempt for refusing to answer certain questions put to him by the court in the presence of the grand jury. Affirmed.

[File endorsement omitted]

[fol. 61] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 164—October Term, 1959

MORRY LAMIN, Petitioner,

—vs.—

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—October 19, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions No. 1 and No. 2 presented by the petition which read as follows:

"1. Whether the secrecy of the proceedings, including the adjudication and sentence for contempt under Rule 42(a) of the Federal Rules of Criminal Procedure, deprived petitioner of Due Process of Law in violation of the Fifth Amendment to the United States Constitution.

"2. Whether the secrecy of the proceedings and of the adjudication and sentence of petitioner for criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure deprived petitioner of a public trial as required by the Sixth Amendment to the United States Constitution."

[Vol. 58]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

—v.—

MORRY LEVINE, Defendant-Appellant.

JUDGMENT—June 2, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, Clerk.

[File endorsement omitted]

[Vol. 59]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

ORDER STAYING MANDATE AND CONTINUING BAIL—
June 23, 1959

A motion having been made herein by counsel for the appellant to stay the issuance of mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted.

A. Daniel Fusaro, Clerk. By David F. Jordan, Jr.,
Chief Deputy Clerk.

Myron I. Shapiro, New York City, for defendant-appellant.
 [Vol. 56] Mark F. Hughes, Jr., Asst. U.S. Atty., S.D. N.Y., New York City (Paul W. Williams, U.S. Atty., and Albin C. Martin and Arthur B. Kramer, Asst. U.S. Atty., New York City, on the brief), for appellee.

PER CURIAM:

Having refused to answer questions before a federal grand jury despite the direction of the district court that he do so, appellant was again brought before the district judge, who in the presence of the grand jury addressed the same questions to him, explicitly directed him to answer them, and upon his refusal to do so, adjudged him guilty of criminal contempt and sentenced him to one year's imprisonment. The propriety of Levine's sentence and of the procedures below leading to his conviction has been recently approved in *Brown v. United States*, 359 U.S. 41, affirming *United States v. Brown*, 2 Cir., 247 F.2d 332, as was the efficacy of the immunity from prosecution granted him under §305(e) of the Motor Carrier Act, 49 U.S.C. §305(d). Hence the errors assigned as to them must be overruled. Similarly, there is no merit in appellant's contention that he was improperly denied compulsory process to prove before the district judge that the grand jury was not in fact investigating violations of the Motor Carrier Act. We know of no decision allowing a witness before a grand jury to probe into the purposes of its investigation or suggesting that the immunity from prosecution granted him would not be valid unless he did so. Levine appeared before the district court as a witness, not a party, *Brown v. United States*, supra, 359 U.S. 41; as such his claim of a right to compulsory process is as much without basis as his contention that the Court's [Vol. 57] very act of propounding the questions to him violated his privilege against self-incrimination. 359 U.S. 41, 50 n. 10. He raises no other points of merit on this appeal.

Affirmed.